BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BLF, INC. dba LARRABURE FRAMING 16161 Ventura Blvd, Suite 102 Encino, CA 91436 Employer	Docket Nos. 02-R4D1-4675 through 4680 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On April 10, 2002, a representative of the Division of Occupational Safety and Health (the Division) opened an investigation at a place of employment maintained by BLF, Inc. dba Laraburre Framing (Employer), at 6220-6292 West 3rd Street, Los Angeles, California. On that date, Jose Jasso, an employee of Employer suffered a serious injury when he fell to his death while employed as a framer. The Division's investigation concluded on October 2, 2002, and on October 4, 2002, the Division issued six citations to Employer, specifically:

1. 342(a), failure to report serious injury;
   Type: Regulatory;

2. 1626(e), no guarding on open side of stairway and stair landing;
   Type: Willful/Serious,

3. 1632(b), unguarded, uncovered floor coverings;
   Type: Willful/Serious,

4. 1632(d), trash chute opening not guarded;
   Type: Willful/Serious,

5. 1670(a), failure to provide fall protection;

Type: Willful/Serious,

6. 341(a)(2), failure to obtain construction permit;
Type: Willful/Regulatory.

Employer filed a timely appeal contesting the citations.

The matter did not come on regularly for hearing. Instead, the matter was stayed pending the completion of the criminal proceedings undertaken by the City of Los Angeles. (See Board regulation section 376(c).)

Specifically, criminal charges were filed on April 1, 2005, in the Los Angeles Superior Court, for four counts of violation of Labor Code section 6425(a). Count one alleged willful violation of 8 C.C.R section 1632(b) for failure to properly guard floor openings with temporary railings, toeboards and covers which resulted in the death of Jose Jasso. Count two alleged willful violation of 8 C.C.R section 1632(d) for failure to guard hatchways and chute openings, which resulted in the death of Jose Jasso. Count three alleged willful violation of 8 C.C.R. 1670(a) through a failure to provide fall protection equipment. And, count four alleged willful violation of 8 C.C.R 341(a)(2) by failing to obtain a necessary permit.

These charges contain, verbatim, the same violations that were the subject of citations 3, 4, 5 and 6.

On July 20, 2005, the jury in the criminal trial returned verdicts of guilty for violating Labor Code section 6425(a) as alleged in counts one, two and three. That is, the jury concluded Employer committed three willful violations of safety orders corresponding verbatim to the citations (3, 4 and 5) filed by the Division herein. Employer was convicted of 1): a willful failure to properly guard floor openings with temporary railings, toeboards and covers which resulted in the death of Jose Jasso, 2): a willful violation of 8 C.C.R section 1632(d) for failure to guard hatchways and chute openings, which resulted in the death of Jose Jasso, and 3): a willful violation of 8 C.C.R. 1670(a) through a failure to provide fall protection equipment.

The Board received a request for expedited hearing by Employer on October 7, 2005, and on October 27, 2005, the Board served all parties with notice of the hearing date set for March 23, 2006.

Twenty days prior to the scheduled hearing, the Division mailed to BLF's counsel a letter, dated March 3, 2006, and a copy of the criminal complaint and certified minute orders of the criminal convictions. BLF's counsel acknowledged receipt of the documents.

On March 23, 2006, the Division called its first witness and commenced with presentation of evidence. Exhibits were offered in to evidence, but the Division's Exhibit 2, a certified copy of the convictions, was withdrawn by the Division from its list of exhibits. The record indicates the Division learned on the first day of hearings that the convictions had been appealed, and therefore, withdrew the exhibit. (The Notice of Appeal was not offered in to evidence by either party. It was submitted by the Employer as an attachment to its April 27, 2006, Opposition to Division's Motion to Reconsider Evidentiary Ruling, and bears a filing date of October 11, 2005.)

In the course of the proceeding, several motions were made by the Division. The Division attempted on several occasions to have the convictions admitted in to evidence. It put forth several legal theories, including collateral estoppel, res judicata, Evidence Code 1300, and requested official notice be taken of the criminal court records. Also, the Division made a motion to continue the matter, a motion to expand the witness list, and a motion to admit transcripts of testimony from the criminal trial proceeding. In the Decision, the ALJ denied all of these motions and refused to consider the criminal court records.

The Employer countered that the motion to admit the certified copies of the criminal convictions was untimely as beyond the 20 day rule of 8 C.C.R 371. It also argued the grounds for a continuance were not satisfied, and that the Division was untimely in its identification of witnesses, and could therefore not expand its list. It also argued that the transcripts of testimony from the previous criminal proceeding were not admissible because they were neither "affidavits" nor were they timely offered under the rules regarding identification of witnesses.

The ALJ rendered a decision on June 4, 2007, granting Employer's appeals as to citations 1-4. The Appeal of citation 5 was granted in part and denied in part, essentially reducing the classification from Willful Serious to Serious, assessing a penalty of $18,000.00. And, the Appeal of citation 6 was granted in part and denied in part in that it was reclassified from Willful Regulatory to Regulatory, assessing a penalty of $935.00. Although the ALJ stated in the transcript that she was going to take official notice of the certified copies of the criminal convictions offered by the Division,[1] in her decision she failed to consider the criminal convictions as evidence of the underlying facts.

Both the Division and the Employer timely filed Petitions for Reconsideration.

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[1] Hearing Transcript, page 439, lines 3-7: "Here's (sic) at some point since I'm taking official notice of the (verdict in the criminal) proceeding, I'll need some record of what the proceeding is, and I will go along with that record, . . ."

The Division contended the Decision was defective for, inter alia[2], failing to take judicial notice of the criminal convictions against the employer for willful violations of the same Safety Regulations at issue in citations 3, 4, and 5, failure to admit the criminal convictions in to evidence pursuant to Evidence Code 1300, and failure to apply the laws of collateral estoppel and res judicata to support denials of employers Appeals of citations 3, 4 and 5.[3]

Employer's Petition for Reconsideration contended the denial of its appeal of citation five is incorrect in that the Division failed to prove the violation was serious. Employer also argued its appeal of citation 6 should have been granted because the only substantial evidence was that Brian Larrabure, rather than BLF, Inc., failed to obtain a permit.

EVIDENCE

The testimony of Debra Lee, Inspector for the Division of Occupational Safety and Health, and the records of her inspection, provided the evidence of what occurred on April 10, 2002, at the employer's worksite. Her testimony was accepted as valid and genuine, and she provided necessary foundation for the photographs and documents she provided.

The employer is a framing sub-contractor, and Jose Jasso was employed as a framer. The evidence was that Jose Jasso was working on the fifth floor of a five story building. He was using a nail gun to affix plywood sheeting to create the fifth floor of the building. In doing so, he worked near the fifth floor opening that was to become the trash chute for the finished building. He fell head first through the opening, falling all the way through to the first floor. He died as a result of this fall.

The trash chute was framed and was not properly covered on either the fifth (top) floor opening, nor was it sufficiently covered on the fourth, third or second floors. The chute was to be the future trash chute of the finished building, and was not being used to dispose of construction site debris. However, the holes in the floor were not covered, but may have been guarded by rails on the second, third and fourth floors. There was more likely than not a covering on the hole on the second floor, but it was insufficient to adequately impede the fall of Mr. Jasso.

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[2] The Division also raises issues of the propriety of the exclusion of the sworn testimony from the prior criminal trial, the exclusion of additional witnesses, exclusion of admissions by the Employer's principal and supervisors, exclusion of supplemental hearsay, as well as assertions of misapplication of 8 CCR 342 (a), 1716.2, as well as multiple arguments that the evidence submitted was in fact sufficient to support the citations. These issues are not reached because of the resolution of the threshold issues regarding the criminal convictions.

[3] The Division also raises the issue of proper notice by the Employer to the Employee or his representative, arguing that failure to actually notify the decedent's representative/attorney of the Notice of Hearing amounts to a mistrial for the jurisdictional defect.

No fall protection equipment such as lanyards or other devices, were on the worksite on the fifth floor, on the day of the accident, for the framers to use.

ISSUES

Was the request to take official notice of the certified copy of the clerk's transcript of proceedings and the jury verdicts in the criminal case improperly considered?

Was the certified copy of the clerk's transcript of proceedings and the jury verdicts in the criminal case admissible under Evidence Code 1300 and thus improperly excluded by the ALJ?

Do the certified copy of the clerk's transcript of proceedings and the jury verdicts collaterally estop the Appeals Board from hearing the same facts as were fully litigated in the previous proceeding?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

In reaching the following Decision After Reconsideration the Board has fully reviewed the record in this matter. Based on our independent review of the record, we find that the ALJ's Order improvidently failed to take official notice of the criminal convictions when initially offered on the first day of hearing. Also, the ALJ misapplied the Evidence Code 1300 and the cases construing its meaning when a final criminal conviction is on appeal. The publication of a Supreme Court case resolving the uncertainty in the law that the ALJ applied convinces us that rehearing is required. Last, although the ALJ did not reach the issues of collateral estoppel or res judicata effect of the criminal convictions of employer because she did not consider them admissible, we write briefly to clarify the current law. Therefore, we return the matter to the ALJ for further proceedings in light of the following analysis.

1. OFFICIAL NOTICE OF CRIMINAL CONVICTION SHOULD HAVE BEEN TAKEN OF THE A CERTIFIED COPY OF THE CLERK'S TRANSCRIPT OF PROCEEDINGS AND THE JURY VERDICTS IN THE CRIMINAL CASES.

The Board finds the Decision should have recognized that it was proper to take official notice of the conviction of BLF on three counts of willfully violating Labor Code § 6425(a).

Official records of any court of California are properly given official notice according to Board Rule 376.3.

> The Appeals Board may take official notice of those matters set forth in section 452 of the Evidence Code, including but not limited to: . . . (3) Records of any court of this state or any court of the United States or of any state of the United States.

The rule allows for a party, or the Appeals Board itself, to request official notice be taken of matters at any time so long as each party is given a reasonable time in which to respond to such requests. Section (d) instructs that "[e]ach party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to (1) the propriety of taking official notice, and (2) the tenor of the matter to be noticed."

Furthermore, subsection (a) recognizes the Board's capacity to take official notice of generally accepted scientific and other matters even after submission of the proceeding for decision. This capacity is shared by all civil and administrative adjudicative bodies. (*Florez* v. *Arroyo* (1961) 56 Cal.2d 492, 496) (See Witkin, 1 California Evidence, 4th ed , ch.1, sec 72 (2008).)

We conclude that the Division's request for official notice was properly made, and that the Employer was given adequate opportunity to respond. The Division made its request for official notice on the first day of the hearing. The request was timely, as it occurred before a decision in the matter had been rendered. The proper response from the ALJ would have been to allow the Employer a reasonable time in which to respond to both the propriety of the request as well as the substance of the matter to be noticed. Although the ALJ ruled from the bench that she could not take official notice because the request was untimely as not made at least 20 days prior to the first hearing, as required by Board Rule 371, the Division renewed its request to admit the convictions in to evidence by written motion received April 11, 2006. The Employer had an opportunity to respond, and did respond, on May 1, 2006. The ALJ's later statement that she intended to take official notice of the convictions was the correct ruling. However, she omits this ruling from the written decision, and does not appear to have relied on the convictions in reaching her conclusions.

Comment [kj1]: The word "tenor" is from the rule, and is perhaps a slightly more general concept than "substance" but I am ok with the change

To be clear, requests for official notice are not always subject to the 20 day requirement of Rule 371, as they can be made at any time until the time a Decision is issued. Rule 371 is a general rule regarding all pre-hearing requests and motions. Subdivision (c) states; "unless otherwise ordered, the following dates shall apply to pre-hearing motions or requests: (1) A motion or request shall be served and filed no later than 20 days before a hearing date." Late filed motions may be heard on a showing of good cause. *Id.* at (d).

However, the rule allowing the Board to take official notice of several types of facts and documents is a more specific enactment. As such, principles of statutory construction dictate that the specific requirements of that rule govern when the Board may take official notice, rather than the general rule for receiving pre-hearing motions. (*Dubois* v. *Workers Comp. Appeals Bd.* (1993) 5 Cal 4th 382, 387.)

The written Decision omits a ruling on the propriety of taking official notice of the jury verdicts in the criminal case. Instead, the Decision states the verdicts in the criminal case cannot be admitted in to evidence because they are on appeal and thus not final. However, the ALJ appears to have taken official notice of the verdicts on the last day of hearing after allowing each party an opportunity to present information on the appropriateness thereof. We conclude the ALJ should have taken official notice of the certified copies of the criminal convictions, and that ruling should have been included in the Decision.

2. EVIDENCE RULE 1300 RECOGNIZES AN EXCEPTION TO THE HEARSAY RULE FOR CONVICTIONS SUCH AS OCCURRED IN THE CRIMINAL MATTER ARISING OUT OF THE SAME FACTS THAT ARE THE SUBJECT OF THIS VIOLATION, AND SO THE CONVICTION MUST BE CONSIDERED AS EVIDENCE OF THE VIOLATIONS.

Board Rule 376.2 states that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." Thus, reliable evidence "shall" be admitted even if technically excludible in civil court. Here, the error was that the evidence was specifically *excluded* from consideration by the ALJ even though it would have been *admissible in civil court* to establish the facts underlying the conviction, and has many indicia of reliability.

The ALJ's reason for refusing to consider the criminal convictions as proof of citations 3, 4, and 5, was that the criminal convictions were not final, and so could not be admitted as evidence under Evidence Code 1300. Since the Decision, the Appellate Courts have determined that the pendency of an appeal does *not* prevent the admissibility of a criminal conviction pursuant to Evidence Code section 1300.[4]

[4] The general rule is that judicial decisions are given retroactive effect when they either resolve a conflict among the lower courts, or establish the meaning of statutory enactments. *Burris* v. *Superior Court* (2005) 34 Cal.4th 1012. The general rule of retroactivity has few exceptions, and those occur only when a litigant has relied to his detriment on prior decisional law, or public policy requires only prospective effect. *Claxon* v. *Waters* (2004) 34 Cal. 4th 367. See *Peterson* v. *Superior Court* (1982) 31 Cal. 3d 147; See *Correa* v. *Superior Court* (2002) 27 Cal.4th 444, 463, fn5, giving retroactive effect to construction of statutory hearsay exception.

Evidence Code 1300 states: "Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere." (West 2009)

In *In re Petersen* (2008 5th Dist) 156 Cal.App.4th 676, the court resolved an apparent conflict in the cases regarding when a judgment is a "final judgment" for Evidence Code 1300 purposes. The judgment is final when the verdict is returned. *Id.* The court clarified that there is "no suggestion that the plaintiff (in a subsequent civil action) must wait until the criminal conviction is affirmed on appeal before that 'judgment of conviction' may be admitted in the civil action to recover the award." (*Petersen* at 692, citing the Cal. Law Revision Commission comment, 29B, Pt 4 to Evidence Code section 1300.)

The reasoning behind this exception to the hearsay rule was well stated. "[The evidence of a prior criminal conviction of a crime punishable as a felony] is particularly reliable. The seriousness of the charge assures the facts will be thoroughly litigated, and the fact that that judgment must be based upon a determination that there was no reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered." *Petersen*, at 692, quoting Cal. Law Revision Commission Comment, supra.

Scouring the history of statutory changes to Evidence Code 1300, the *Petersen* court carefully concluded that the words "final judgment" in that section can and must only mean the final *trial court* determination, irrespective of the pendency of any active or proposed appeal.

"The 'judgment that manifests persuasion of the jury beyond a reasonable doubt' is the trial court's judgment, not an appellate court's affirmance of that judgment." (*Petersen* at 693.) We must follow the determinations of the Appellate Court in considering whether a convicted defendant's Notice of Appeal defeated the admissibility of the certified criminal conviction for purposes of Evidence Code 1300. This rule has been thoroughly vetted, and it is clear the ALJ's reason for refusing to consider the certified copies of the criminal convictions, to wit, that they were on appeal, is not the law today.

The Board also concludes that the other reasons articulated in the Decision for refusing to consider the criminal convictions as evidence of the cited violations indicate a misapplication of Evidence Code 1300. Specifically, that hearsay exception applies to convictions of crimes "punishable" as felonies, and so the consideration of the actual sentence imposed is the

incorrect consideration. And, the weight to be given the certified copy of the conviction will arise in the rehearing, so we write at length to clarify the applicable rule.

It is the potential for a felony conviction that underlies the exception to this long standing hearsay rule, not the ultimate sentence received. (*Rusheen* v. *Drews* (2002 2nd Dist) 99 Cal.App.4th 279, 285.) That "[s]ection[,] 1300[,] applies to any crime punishable as a felony. The fact that a misdemeanor sentence is imposed does not affect the admissibility of the judgment of a conviction under this section." *Id.*

Under Labor Code 6425(a), willful violation of standard or order causing death or serious injury to employee, is a crime that may be punishable as either a misdemeanor or a felony.

> Any employer and any employee having direction, management, control, or custody of any employment, place of employment, or of any other employee, who willfully violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, and that violation caused death to any employee, or caused permanent or prolonged impairment of the body of any employee, is guilty of a public offense punishable by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding one hundred thousand dollars ($100,000), or by both that imprisonment and fine; or by imprisonment in the state prison for 16 months, or two or three years, or by a fine of not more than two hundred fifty thousand dollars ($250,000), or by both that imprisonment and fine; and in either case, if the defendant is a corporation or a limited liability company, the fine may not exceed one million five hundred thousand dollars ($1,500,000).

Since this statute allows for punishment as either a felony or a misdemeanor, convictions there under qualify as hearsay exceptions under Evidence Code section 1300 irrespective of the actual punishment imposed. (*Leader* v. *California* (1986 2nd Dist.) 182 Cal.App.3d 1079.) In *Leader*, a misdemeanor conviction of resisting arrest was admissible under Evidence Code 1300. It was offered to impeach plaintiff's testimony that he was without fault in causing the injuries that were the subject of his later civil battery claim against the California Highway Patrol and its officer. Resisting arrest is chargeable as a felony, and so the misdemeanor conviction for resisting arrest was admissible in a subsequent civil matter, as an exception to the hearsay rule. *Id.*

Here, the analysis contained in the ALJ's Decision improperly gives weight to the sentence actually imposed. The correct inquiry is to the potential punishment contained in the statute under which the defendant was charged. (*Petersen*, supra at 690, quoting 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay sec. 272, p. 989.)

The conviction itself is reliable proof, without more, that the defendant committed the acts of which he was convicted, and a judgment based solely on the prior conviction is appropriate when the same acts that support the criminal conviction are the subject of later civil claims. (*Petersen* at 695-6. "[A] criminal conviction is 'prima facie evidence of the facts involved' in the crime, and . . . 'the conviction is admissible in evidence not merely as proof of the conviction, but also as presumptive proof of the commission of the crime.'" (*Id.* quoting *Shindler* v. *Royal Ins. Co* (1932) 258 N.Y. 310).) "The civil plaintiff need not bring in witnesses from the criminal trial to survive a defense motion for non-suit. To require such additional evidence in cases where there is no defense would defeat the purpose of the hearsay exception." Id. The verdict is essentially a statement by the jury that is extremely reliable for the truth of the conclusions therein. "The judgment possesses great probative force, since it manifests persuasion of the jury beyond a reasonable doubt." (*Petersen* at 693, [quoting 6 Cal. Law. Rev. Comn. Rpts (1964) p. 540].)

Neither the potential nor actual pendency of an appeal, nor the final imposition of a misdemeanor sentence, defeat the admissibility of the criminal convictions under Evidence Code 1300. Since the decision misconstrues these two components of Evidence Code 1300, rehearing of citations 3, 4, and 5 is required. The convictions were for crimes punishable as felonies, and the trial court judgment was a "final judgment". The requirements of Evidence Code section 1300 have been met, and the convictions are admissible and must be considered as evidence of the identical facts which underlie the violations contained in citations 3, 4, and 5.

3 THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES TO THE PRIOR CRIMINAL CONVICTIONS OF EMPLOYER IN THIS SUBSEQUENT PROCEEDING FOR THE IDENTICAL CONDUCT.

The doctrine of collateral estoppel applies to prohibit re-litigation of issues finally determined in a prior criminal proceeding. (*Teitelbaum Furs* v. *Dominion Insurance Co. Ltd.* (1962) 58 Cal 2d 601.) The prior conviction will conclusively establish the facts of the subsequent proceeding so long as the issues are identical, the previous award is final, and the party against whom the doctrine is applied is either the same party as in the prior litigation, or is in privity therewith. (*People* v. *Taylor* (1974) 12 Cal. 3d 686; *People* v. *Sims* (1982) 32 Cal. 3d 468; *Leader*, supra, at 1083.)

When the prior conviction results in a misdemeanor, collateral estoppel effect is allowed when certain safeguard standards are in place. The prior conviction must be for a "serious" offense, a full and fair misdemeanor trial must actually occur, and the issue on which the prior conviction is offered must of necessity have been decided in the criminal trial. *Leader* at 1087.

In *Leader*, the three safeguards were met. Leader brought a civil suit against the Department of California Highway Patrol for injuries sustained during his arrest. Id. Prior to bringing the civil suit, he was convicted of resisting arrest, and the criminal and civil matters arose out of the same incident. The prior misdemeanor conviction operated to collaterally estop the re-litigation of the fact of his battery on the officer. First, the crime of resisting arrest was "serious" because it could have been punishable as a felony. (*Id.* at 1088.) Second, defendant actually litigated his criminal charges, retaining counsel, cross examining witnesses, and appearing in court personally for the trial. *Id.* Last, the issue of *Leader's* guilt of battery on a police officer was identical to both proceedings. *Id.*

Therefore, since these safeguards were met, the misdemeanor criminal conviction operated to estop Leader from re-litigating the issue of whether he battered the police officer in his later civil claim against the police officer for injuries sustained in the course of his arrest. The court concluded, "[t]he battery and resisting arrest convictions are *conclusive* on those issues and are to be considered by the trier of fact on the ultimate issue of whether unreasonable force was used against Leader during the arrest." (*Leader* at 1089 (emphasis in original; citations omitted).)

The Decision below fails to reach the issue of collateral estoppel because the certified copies of the criminal convictions were not admitted in to evidence for reasons the Board herein determines to be incorrect. On rehearing, the ALJ is directed to consider the effect of the doctrine of collateral estoppel on the Employer's ability to present any evidence contrary to the conclusions reached by the jury in the criminal proceeding. Upon verification that the three *Leader* safeguards exist here, we believe the convictions are conclusive on the issues of whether citations 3, 4, and 5 occurred.

DECISION AFTER RECONSIDERATION

The Board vacates the decision below in regard to citations 3, 4, and 5, and affirms the decision below for its conclusions concerning citations 1, 2, and 6. The matter is remanded to the hearing operations unit for further proceedings consistent herewith.

CANDICE A. TRAEGER, Chairwoman

ROBERT PACHECO, Board Member
ARTHUR CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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